U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: FEB 0 1 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a neurosurgeon on the house staff at the
The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on July 29, 2011. In an accompanying statement, counsel stated:

> [The petitioner's] expertise enables him to produce research that improves the clinical outcomes of patients suffering from a plethora of brain disorders such as tumors. His research has been widely read and has even been cited by other medical researchers.

> . . . [The petitioner] has contributed to a textbook that is used by physicians throughout the country. . . .
>
> **He has also published his findings in one of the premier journals in the neurosurgery specialty.**

(Emphasis in original.) The petitioner's *curriculum vitae*, submitted with the petition, listed two published works: one book chapter and one journal article. The initial filing of the petition included no evidence that the petitioner's two published works have "been widely read" or "cited by other medical researchers." The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel stated: "According to renowned leaders in the field, [the petitioner] is established as an outstanding neurosurgeon who has advanced the field through his research and whose clinical skills are virtually unmatched by others in his field." Counsel did not identify the "renowned leaders" or quote any of their statements on the petitioner's behalf. The petitioner's initial submission contained no witness letters. Therefore, counsel's assertion is another unsupported claim.

Throughout the opening statement, counsel listed various facts about the petitioner's career as though they were self-evident proof of his standing in the field. For example, counsel stated "**There is no doubt that [the petitioner] would not be employed at if he did not have top clinical abilities in his field**" (emphasis in original.) Regarding one of the petitioner's research projects, counsel stated:

> ***One of [the petitioner's] research [projects] received $164,748.00 in funding from the The only awards $500,000.00 in funding each year. The fact that [the petitioner's] research project earned over 1/3 of the available funding is a testament to how important and novel the research is.***

(Emphasis in original.) The AAO notes that $164,748 is slightly less than one-third of $500,000, not "over 1/3" as counsel asserted. More to the point, the funding of a given project demonstrates only that the project met the funding entity's criteria. The petitioner did not submit any evidence of those criteria, or even any evidence of the funding itself. The petitioner also failed to establish the average amount of a grant from the Without that information, it is not possible to draw conclusions from the amount of the petitioner's claimed grant.

Counsel concluded that the petitioner "has contributed to the field and continues to do so through his novel research, something that most neurosurgeons cannot engage in as they have never been exposed to Counsel did not explain why "neurosurgeons cannot engage in" "novel research" unless they have "been exposed to ," nor did counsel support the claim that "most neurosurgeons" lack such training. Even if they did,

exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for a labor certification. Special or unusual knowledge or training, while perhaps attractive to the prospective United States employer, does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *NYSDOT*, 22 I&N Dec. 221 (footnote omitted).

The director issued a request for evidence on February 10, 2012. The director quoted from counsel's cover letter (discussed above) and instructed the petitioner to submit evidence to meet the guidelines set forth in *NYSDOT*. The director listed some types of documentary evidence that would provide helpful information in this regard.

The director specifically acknowledged counsel's claim that the petitioner "received the for his clinical performance." The director stated: "Any awards for work in the field must be accompanied by a statement from the institution that granted the award, commenting on the number of awards given, the frequency of the award, the criteria for granting the award, and the number of individuals eligible to compete for the award."

In response, counsel referred to the petitioner's "award winning clinical skills," but the petitioner did not submit any new evidence about his claimed award.

Counsel stated that the petitioner "is one of the few neurosurgeons in the world who has experience with . . . with only a handful of centers in the entire world having access to such technology." Counsel identified no evidence to support this claim; news articles in the record indicate that the technique is experimental, and therefore not yet in widespread use. Even granting counsel's claims, the scarcity of the skill is not inherently a basis for the waiver. If the skill is a basic job requirement, then it can presumably appear on a labor certification. Furthermore, just because very few people know how to perform a given procedure does not necessarily mean that the procedure is especially difficult or requires a rare level of skill. If "only a handful of centers in the world hav[e] access to such technology," then it is to be expected that only a small number of surgeons will have been able to train on that equipment. As explained previously, an alien's training in existing technology does not presumptively qualify that alien for the national interest waiver.

Counsel asserted that the petitioner's "contribution to the widely used text book" demonstrates "that he is an elite member of his field. Only a neurosurgeon of a very high caliber could contribute to a book that is used as a reference source by others in the field." Counsel cited no evidentiary support for the claim that the textbook is "widely used," or that "[o]nly a neurosurgeon of a very high caliber could contribute" to such a textbook. The record contains a copy of the textbook chapter, but no chain of evidence showing how the petitioner came to co-write the chapter.

Counsel contended that "there is no doubt that [the petitioner] is known to leading experts from across the nation. . . . There is no doubt that [the petitioner] stands as one of the leading experts in

the field who has achieved sustained national acclaim for his work." The petitioner cannot sidestep the burden of proof simply by declaring emphatically that "there is no doubt" about his standing in the field. The outcome of the proceeding must rest on the evidence provided, not on counsel's interpretation of that evidence (or claims advanced with little or no evidence).

The petitioner submitted copies of two letters dating from July 2010, prepared in support of an earlier (denied) petition. associate professor at stated that the petitioner "has gained widespread recognition in the medical community for his expertise in performing minimally invasive neurosurgery and his expert management of critically ill patients." asserted that the petitioner is "also a cutting-edge physician scientist" whose research has been "very well received by . . . neurosurgeons." contended that the petitioner "is considered one of the top neurosurgeons in the country," and asserted:

> [The petitioner] has been invited to be a member of some of the most prestigious and competitive medical organizations in the world. This impressive list includes the the
> Membership in these organizations requires specific experience and expertise in one's field as well as significant research contributions to the field. The fact that the [petitioner] boast membership in theses [*sic*] highly esteemed, selective organizations is evidence of his superior reputation as an extraordinary neurosurgeon.

The record contains no evidence from any of the associations named to show that membership is "competitive" or "selective," or indeed to confirm the petitioner's membership. Absent such evidence, assertions are uncorroborated.

assistant professor at the stated that the petitioner "prominently stands out in the field of neurosurgery as one of the most experienced and extraordinary physician-scientists in the United States today." asserted that the petitioner "has successfully performed over 800 surgeries without any complications, a truly extraordinary feat," and that "he is also known for producing clinical and scientific research that has furthered the neurosurgery field." Like made specific claims about the nature of the petitioner's work, but offered only generalities about its impact. Both witnesses contended that the petitioner is one of the top neurosurgeons working in the United States today, a claim for which no evidence appears to exist except for letters written specifically to support the petition.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have received consideration above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as above, evaluate the content of those letters as to whether they support the alien's eligibility. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The letters considered above contain assertions of acclaim and recognition, with no corroborating evidence to show that those assertions are credible. The witnesses made specific claims of fact which ought to be amenable to verification and evidentiary support, but the petitioner has not provided that support. The strategy, instead, has been to portray the petitioner's credentials as being so self-evidently impressive that no further evidence or inquiry should be necessary.

In a new letter, dated April 24, 2012, associate professor at provided a positive but unremarkable recommendation letter for the petitioner:

> [The petitioner] has been a resident in the Department of Neurosurgery at the He has performed his duties in good standing with the utmost care and compassion that one would expect from their physician. He conducts himself with integrity and honesty.
>
> While at the he has developed an expertise in surgery. He independently conducted a preclinical study validating this novel technology against the contemporary intracerebral treatments utilizing gamma knife radiosurgery, radiofrequency lesioning and deep brain stimulation. Additionally, he has assisted in our clinical trial of MR guided focused ultrasound thalamotomy for the treatment of medication refractory essential tremor which represents the first trial for the treatment of human movement disorders in the world. [The petitioner's] expertise and contributions to these projects have been invaluable.

did not specify the nature of the petitioner's involvement in the clinical trial, but the assertion that he "assisted" does not imply that the petitioner was responsible for initiating or designing the trial. It implies, instead, a more supporting role, and did not establish that others would have been unable to fill that role. An alien's job-related training in a new method, whatever its importance, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *NYSDOT*, 22 I&N Dec. 221, n.7.

Furthermore, the clinical trial that mentioned appears to have begun after the petition's filing date. The initial submission included the petitioner's own detailed list of claimed accomplishments, and the clinical trial was not among them. An accompanying news article mentioned a patient who received the experimental treatment in August 2011, after the petition's July 29, 2011 filing date; results appear not to have been announced until several months later. (Several articles date from April 2012, indicating that the story was new at the time.) An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the benefit request. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The director denied the petition on July 27, 2012, noting that the petitioner had not corroborated a number of key claims regarding, for instance, awards received and the membership standards of professional associations. The director acknowledged the petitioner's published work, but found that the petitioner had not established its importance or influence.

On appeal, counsel repeats the claim that the petitioner is one of "literally only a handful of neurosurgeons in the entire world" with "the ability to perform Surgery." The director had previously acknowledged the substantial intrinsic merit of advanced neurosurgery techniques.

Counsel states that the petitioner "spends the vast majority of his time in the operating room," and therefore it is unfair to compare his publication record to that of "professionals who only engage in research." Provision of clinical care is, by nature, more restricted in its scope than the publication of research is; a publication can reach countless readers, whereas a surgeon can only perform so many operations. For this reason, counsel had emphasized the petitioner's published work when attempting to establish that the benefit from his work is national in scope. On appeal, when confronted with the absence of evidence of the impact of that same published work, counsel seeks to downplay the research aspect of the petitioner's work. (Nevertheless, in the next paragraph, counsel maintains that the petitioner "is in the process of conducting cutting-edge research.") Counsel also claims that "publications that are geared towards improving clinical care are generally cited less than publications that are more academic in nature," but offers no support for this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 165.

Counsel maintains that the petitioner "is considered an authority in the field as he has authored several chapters in widely used reference books. . . . [O]nly the foremost experts in the field are selected to contribute to them." The record establishes the petitioner's authorship of the chapters, but there is no evidence that the books are "widely used" or that "only the foremost experts in the field are selected to contribute to them." The evidence of authorship does not establish or imply either of these points. The record shows that the petitioner has learned experimental techniques at but this training is not sufficient to support the full weight of a national interest waiver claim.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.